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In The
# Supreme Court of the United States
October Term, 1988

JOHNSON MOVING AND STORAGE COMPANY,
*Petitioner,*

v.

EDWARD H. DANIELS,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF COLORADO**

## BRIEF FOR RESPONDENT EDWARD H. DANIELS IN OPPOSITION

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## QUESTIONS PRESENTED*

I. Whether this Court has jurisdiction to grant Petitioner's Petition for a Writ of Certiorari when the lower court's decision was based solely upon the application of state contract law.

II. Whether Petitioner received sufficient warning of the double recovery problem of which it now complains and thereafter refused to follow the recommendations of the Interstate Commerce Commission and United Van Lines on how to avoid such double recovery.

III. Whether the cases cited by Petitioner in its Petition as being in conflict with the lower court's decision in the present case are actually in conflict when such cases were brought based on entirely different claims than those presented in this case and thus were decided on entirely different bases.

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* Pursuant to Sup. Ct. R. 28.1 Respondent Edward H. Daniels would state that he is a natural person and thus has no subsidiaries or parent corporations.

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## RELEVANT STATUTORY PROVISIONS

In citing what it considered to be the relevant portions of Interstate Commerce Commission, Regulation Ex Parte 311 (Sub.-No. 4), *Modification of the Motor Carrier Fuel Surcharge Program,* 46 Fed. Reg. 50070, 365 I.C.C. 311 (decided October 5, 1981; effective February 12, 1982) (hereinafter Ex Parte 311), Petitioner Johnson Moving and Storage Company (hereinafter Johnson) failed to include three pertinent sections of Ex Parte 311 that were of paramount importance to the trial court and the Colorado Court of Appeals in reaching their decisions in this case. Those pertinent sections are as follows:

First, Ex Parte 311 states the following:

> "Since owner-operators generally are paid on a percentage of revenue basis, situations could arise where an owner-operator could receive dual compensation—receive fuel compensation under a cents-per-mile payment while receiving a share of both the folded-in surcharge and future fuel-related increases."

Ex parte 311, 46 Fed. Reg. 50072.

Ex Parte 311 further states at 46 Fed. Reg. 50072 that to "prevent dual compensation the parties may modify the lease to provide for 100% retention by the carriers of any Ex Parte 311 fuel-related increases."

Finally, at 46 Fed. Reg. 50072, Ex Parte 311 states that "if the parties have modified their leases to prevent "dual compensation" *as suggested above,* carriers shall provide owner-operators with a copy of Appendix C . . .". Emphasis added.

## STATEMENT OF THE CASE

Johnson's Statement of the Case (Petition at 3-4) contains four inaccurate statements that must be corrected. Those inaccuracies are as follows:

1. First, Johnson states that the "new regulation (Ex Parte 311) required household moving companies, including Johnson Moving and Storage Company . . ., to collect an additional amount of 9.4% from its shippers . . .". Petition at 3. The reference to 9.4% in the above quotation is to a surcharge of 9.4% of the line haul revenue that was charged to each of the shippers who hired Johnson during the relevant time period.

The above quotation is inaccurate in that Ex Parte 311 did not require household moving companies to collect an additional amount of 9.4%. The only requirement of Ex Parte 311 was that carriers such as Johnson pay to owner-operators such as Respondent (hereinafter Daniels) a mandatory cents per mile amount. Ex Parte 311, 46 Fed. Reg. 50071.

The 9.4% surcharge was utilized by Johnson to provide the funds to pay the cents per mile amount required by Ex Parte 311. Ex Parte 311 permitted carriers to apply for permission to charge shippers such a surcharge, but did not require them to do so. Ex Parte 311, 46 Fed. Reg. 50073-50074; Interstate Commerce Commission, *The Fuel Surcharge—Some Questions and Answers,* July 1982 (hereinafter the *ICC publication*).

2. Second, Johnson states that Daniels "was paid under the dictates of Ex Parte No. 311 until his termination . . .". Petition at 4. Such statement raises an infer-

ence that the method by which Johnson determined the entire amount of compensation paid to Daniels was dictated by Ex Parte 311. Such is not correct.

The only requirement of Ex Parte 311 was that owner-operators such as Daniels receive at least the mandatory cents per mile amount. Ex Parte 311, 46 Fed. Reg. 50071. Ex Parte 311 was implemented to provide reimbursement for owner-operators for their fuel costs in excess of 63.5 cents per gallon. Ex Parte 311, 46 Fed. Reg. 50071. Ex Parte 311 was not created to affect any other aspect of the compensation that was agreed upon contractually between the carrier and the owner-operator. Ex Parte 311, 46 Fed. Reg. 50073. There was nothing in Ex Parte 311 that prohibited carriers such as Johnson from compensating owner-operators such as Daniels at a rate higher than the required cents per mile figure. The *ICC publication*, question 20 at page 6.

As a result of the provisions of Ex Parte 311, during the time period at issue Daniels was compensated for his fuel costs in excess of 63.5 cents per gallon. Petition at A-2. However, Daniels was not compensated as was required under the independent contractor contract that was in force between Johnson and Daniels at all times pertinent hereto (hereinafter the contract). Such failure by Johnson to abide by the provisions of the contract provided the bases for Daniels' claims against Johnson.

3. Third, Johnson's statement of the claims that Daniels made in his lawsuit (Petition at 4) is inaccurate.

Daniels' first claim against Johnson was that the 9.4% surcharge was an additional tariff item, as such term was defined by the contract. Daniels claimed that, pur-

suant to a provision of the contract that required Johnson to pay to Daniels 100% of all additional tariff items generated by Daniels, Johnson had been required to pay to Daniels 100% of the 9.4% surcharge generated by Daniels. Daniels further claimed that Johnson failed to pay to Daniels 100% of the 9.4% surcharge generated by him. As a result, Daniels was damaged in an amount equal to the difference between the full 9.4% surcharge amount generated by Daniels and percentage of such surcharge amount actually paid by Johnson to Daniels.

Daniels' second claim against Johnson was that the contract required that Daniels receive, as compensation, a stated percentage of the line haul revenue charged to each shipper whose goods were carried by Daniels. The 9.4% surcharge was "rolled-into" or added into the line haul revenue charged to each shipper. Daniels claimed that the 9.4% surcharge was "backed out" or removed from the total line haul revenue figure by Johnson prior to calculating Daniels' compensation, thus reducing the compensation paid to Daniels by Johnson.

Daniels further claimed that the contract required that Daniels had to agree, in writing, to any modification of the contract that acted to reduce his compensation and that no such written agreement was ever entered into. Daniels therefore claimed as damages the difference between the amount that he would have received as compensation had Johnson not backed out the 9.4% surcharge prior to calculating Daniels' compensation and the percentage of the line haul revenue which Daniels actually received. The trial court and the Colorado Court of Appeals found in favor of Daniels on both such claims. Petition at A-4. and A-6 and A-7.

4. Fourth, Johnson states in the first paragraph of its Statement of the Case that "this case presents important issues as to the interpretation of (Ex Parte 311)." Petition at 3. Such is not correct.

Daniels' claims against Johnson were based solely upon Johnson's failure to compensate Daniels as was required by the contract. The trial court's decision was based entirely upon its interpretation of three provisions of the contract. Petition at A-4 and A-5. The Colorado Court of Appeals concurred with the trial court's reasoning. Petition at A-6 and A-7. The trial court found that Daniels' claims could be resolved adequately by application of principles of state contract law and did not require any interpretation of Ex Parte 311.

Finally, Johnson fails to state in its Statement of the Case that Johnson, at all times pertinent hereto, acted as an agent of United Van Lines (hereinafter UVA). Petition at A-1.

## SUMMARY OF THE ARGUMENT

This Court has no jurisdiction to render opinions on cases that were decided by state courts when such decisions were based on adequate state grounds. In this case, the trial court reached its decision based upon the application of principles of state contract law. The Court of Appeals affirmed the trial court's decision and the State Supreme Court declined to grant certiorari. Therefore, this Court has no jurisdictional basis to hear Johnson's Petition.

Johnson was warned by the Interstate Commerce Commission and by United Van Lines of the potential for the precise dual compensation problem of which Johnson is now complaining. Johnson was advised that in order to avoid such dual compensation problem with Daniels, Johnson needed to modify its contract with Daniels. This Johnson failed to do.

The cases cited by Johnson in the Petition are not on point and are not in conflict with the decision in the present case. Therefore, the Petition should be denied.

## ARGUMENT AS TO WHY THE PETITION SHOULD BE DENIED

### I. This Court does not have a jurisdictional basis to hear this case as the decision in this case was based solely upon the application of principles of state contract law.

When a case has been decided by a state court on adequate and independent state grounds, this Court has no jurisdiction to render a decision on the case. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965). As this Court has stated, "Our only power over state judgements is to correct them to the extent that they incorrectly adjudge Federal rights." *Herb v. Pitcairn*, 324 U.S. 117 at 125-126 (1945).

The decision in the present case rests upon adequate and independent state grounds. In ruling on Daniels' claims, the trial court found that the 9.4% surcharge was an additional tariff item, as such term was used in the

contract. Petition at A-4. In addition, the trial court found that Johnson's practice of backing out the 9.4% surcharge from the line haul revenue prior to calculating Daniels' compensation constituted a material breach of the compensation and modification provisions of the contract. Petition at A-4. The trial court reached its decision based upon the application of state contract law.

The Colorado Court of Appeals concurred with the decision of the trial court. The Court of Appeals found that the record supported the findings that the 9.4% surcharge was as additional tariff item. Petition at A-6. The Court of Appeals also found that the backing out of the surcharge from the line haul revenue by Johnson prior to computing Daniels' compensation was a material breach of the compensation and modification provisions of the contract. Petition at A-6 and A-7.

This Court has held that when the decision of a state court rests upon the interpretation of a particular clause of a contract, this Court has no jurisdiction to review the state's courts decision. *Black v. Cutter Laboratories,* 351 U.S. 292 (1956). Such is the situation with which this Court finds itself presented with Johnson's Petition. Johnson is asking this Court to review a decision of a Colorado state court which was based solely on the interpretation of contractual provisions. This Court has no jurisdictional bases to do so.

## II. Johnson was warned that unless it modified its contract with Daniels, the provisions of such contract would necessitate the payment of "dual compensation" to Daniels.

When Ex Parte 311 was written, its drafters recognized that, as a result of compliance with its provisions,

dual compensation of those owner-operators (such as Daniels) who were paid on a percentage of revenue basis would result. The dual compensation would arise if carriers charged to shippers a surcharge to provide the funds for the cents per mile payments required by Ex Parte 311, and then rolled such surcharges into the line haul revenue. Owner-operators would receive as compensation the applicable percentages of both the line haul revenue and the surcharge. In addition, Ex Parte 311 required the carrier to pay to the owner-operator the mandated cents per mile funded by the surcharge. In short, pursuant to a percentage of revenue contract, the owner-operator would receive both the full surcharge pursuant to Ex Parte 311 and a percentage of the surcharge, as contractually required compensation. Hence the dual compensation problem.

As a method of avoiding dual compensation, Ex Parte 311 advised carriers to modify their contracts with the owner-operators to allow the carrier to back out the surcharge from the line haul revenue before calculating the owner-operator's compensation. The Interstate Commerce Commission amplified their recommendations on modifying contracts by stating that unless the contracts were modified to specifically allow a back out of the surcharge, the carrier could not back out the surcharge prior to calculating compensation. The Interstate Commerce Commission stated that "Unless (and until) such revisions were made in the leases, owner-operators would receive both the cents per mile payment . . . and a percentage of the fuel-related increases folded into the carrier's rates." The *ICC publication,* question 18 at page 4. See also, the *ICC publication,* question 19 at page 5.

The trial court found that Johnson, as an agent for UVA, was warned by UVA of the dual compensation problem presented by Ex Parte 311. Petition at A-2. In addition, the trial court found that Johnson was advised by UVA to consider modifying its contract with the owner-operators in its employ, as was recommended by the Interstate Commerce Commission, to avoid paying dual compensation.

Johnson never modified the contract to allow Johnson to back out the surcharge prior to calculating Daniels' compensation. Johnson unilaterally backed out of the line haul revenue the 9.4% surcharge prior to calculating Daniels' compensation. Petition at A-4 and A-5; Petition at A-6. Such was a violation of the provisions of the contract concerning compensation and concerning the requirements for modifying the contract. Petition at A-4 and A-5. Such unilateral action by Johnson also violated Interstate Commerce Commission requirements and was in direct contravention of advice received by Johnson from UVA. Petition at A-4 and A-5.

Johnson states that "The decision below allowing Daniels the total 9.4% of the additional line haul revenue conflicts with the regulation." Petition at A-5. Such statement infers that Ex Parte 311 specifically barred dual compensation. Such is not correct. Ex Parte 311 specifically warned that unless contracts between carriers and owner-operators paid on a percentage of revenue basis were modified, dual compensation would result.

The only reason for the enactment of Ex Parte 311 was to provide reimbursement to owner-operators for their fuel costs in excess of 63.5 cents per gallon. Ex Parte 311

was silent on the dual compensation issue except to provide a warning that such issue would arise in cases of owner-operators compensated on a percentage of revenue basis. Ex Parte 311, 46 Fed. Reg. 50072. Any statement that Ex Parte 311 either implicitly or explicitly bars dual compensation or double recovery is false.

## III. The two cases cited by Johnson as being in conflict with the decision in the present case are clearly distinguishable and are not in conflict.

Johnson states that its Petition should be granted by claiming that the case of *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266 (10th Cir. 1983) (hereinafter *Central Forwarding*) is in conflict with the decision in the present case. Petition at 5. While not specifically stating so, the implication is that such allows the granting of Johnson's Petition under Sup. Ct. R. 17.1(b).

The court in *Central Forwarding* found that the Interstate Commerce Commission had exceeded the statutory authority granted it by Congress in promulgating Ex Parte 311. *Central Forwarding*, 698 F.2d at 1271. Accordingly, the court vacated the orders promulgating Ex Parte 311. *Central Forwarding*, 698 F.2d at 1285.

The court in *Central Forwarding* was explicit in stating that its ruling would have no effect on actions taken pursuant to Ex Parte 311 prior to the date of the decision in *Central Forwarding*. The court in *Central Forwarding* stated:

> "*The judgement intends no retroactive effect.* The regulation allowed carriers to fold into their rates charged to shippers the surcharge that existed under the previous surcharge program, *and this judgement*

*does not require the fold-ins that took place during a transition period to be undone."*

*Central Forwarding,* 698 F.2d at 1285. Emphasis added.

The present case concerns actions taken by Johnson in the period from April 13, 1982 through November 22, 1982. Petition at A-1 and A-2. *Central Forwarding* was decided on February 28, 1983. *Central Forwarding,* 698 F.2d at 1266. Pursuant to the specific holding of the court in *Central Forwarding* cited above, the decision in *Central Forwarding* cannot affect the relationship between Johnson and Daniels, as such relationship ended prior to February 28, 1983. Petition at A-2.

The question addressed in *Central Forwarding* was whether or not the Interstate Commerce Commission had exceeded its statutory authority in promulgating Ex Parte 311. The questions addressed by the state courts in the present case concerned whether or not Johnson had breached certain provisions of the contract. Under no circumstances can the decision in the present case be found to be in conflict with the holding in *Central Forwarding.*

Johnson cites as a second case whose holding is in conflict with holding in the present case *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Dixie Transport Co., et al.,* 1984 Federal Carriers Cases, Para. 37,109 (I.C.C. Rev. B. June 30, 1984) (hereinafter *International Brotherhood*). *International Brotherhood* was not decided by a federal appellate court or a state court of last resort. It was, in fact, decided by an administrative law judge and was affirmed by a review board. *International Brotherhood,* Para. 37,109 at page 47,360. As such *International Broth-*

*erhood* does not fall under the general criteria for granting a Writ of Certiorari as set forth in Sup. Ct. R. 17.1. Of far greater import, however, is the fact that *International Brotherhood* and the present case were decided on different grounds and thus are not in conflict.

In *International Brotherhood* the administrative law judge interpreted the requirements of surcharge orders enacted by the Interstate Commerce Commission prior to the enactment of Ex Parte 311. The original decision in *International Brotherhood* was handed down on April 22, 1981. *International Brotherhood*, Para. 37,109 at page 47,360. The effective date of Ex Parte 311 was April 13, 1982. Petition at A-1.

Even had *International Brotherhood* concerned the provisions of Ex Parte 311, its decision is not in conflict with the decision in the present case. The plaintiffs in *International Brotherhood* were claiming that the pertinent Interstate Commerce Commission regulations required the carriers to pay to the owner-operators 100% of any surcharge amount. The administrative law judge in *International Brotherhood* disagreed and held that the pertinent Interstate Commerce Commission regulations required only that the owner-operators be reimbursed for their fuel costs in excess of 63.5 cents per gallon. *International Brotherhood*, para. 37,109 at page 47,361.

In the present case Daniels did not claim that Johnson had misapplied the provisions of Ex Parte 311. What Daniels claimed was that Johnson failed to distribute the monies generated by Daniels in accordance with the provisions of the contract. *International Brotherhood* and

the present case are clearly distinguishable and are not in conflict.

## CONCLUSION

For the above reasons Respondent Edward H. Daniels would respectfully request that Johnson's Petition for a Writ of Certiorari be denied.

December, 1988

Respectfully submitted,

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